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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner
v.
DAVID P. BLAIR, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit which affirmed the judgment of the District Court assessing damages.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but a copy thereof is appended hereto at page 15. The opinion of the District Court is reported at 312 F.Supp. 293 and is appended hereto at page 18.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1971. A timely petition for rehearing in banc was denied July 20, 1971 and this petition was filed within 90 days of that date.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a longshoreman is injured while loading a barge temporarily tied up at his employer's landing for loading purposes, due to an alleged unseaworthy condition therein:

(a) can the longshoreman bring an action for damages against his employer because of such unseaworthy condition where the employer is neither the owner nor the bareboat charterer of the barge in question and has no operational interest in said vessel; or

(b) is the injured longshoreman's remedy under the Longshoremen's and Harbor Workers' Compensation Act exclusive insofar as the liability of the employer is concerned?

STATEMENT OF THE CASE

This is an admiralty action brought by the plaintiff to recover damages for personal injuries allegedly sustained by him while working as a pipe loader for the defendant on a barge located at defendant's landing on the Monongahela River at McKeesport, Pennsylvania (5a, 6a). The cause of action is asserted under the maritime doctrine of seaworthiness (6a).

Plaintiff was first employed by defendant, petitioner herein, at its National Tube Works in McKeesport, Pennsylvania in December, 1964 as a pipe loader in the Shipping Department (89a, 155a). Prior to February 7, 1967 his work had always been performed in the plant or surrounding area on the land or on railroad cars (88a, 89a, 156a). On February 7 and 8, 1967 defendant assigned plaintiff to assist in loading pipe in barges at defendant's barge loading area and according to defendant's records, plaintiff was engaged in that work on both days between the hours of 3 and 11 p.m. (153a, 155a, 164a).

The barges on which plaintiff worked on the two days mentioned were Barge No. 810 owned by A. L. Mechling Barge Lines, Inc. and Barges Nos. 388 and 456 owned by Ohio Barge Line, Inc. Of these barges, only Barge No. 810 was a jumbo covered barge (49a, 65a, 66a, 170a). Although the testimony in this case was to the effect that Barge No. 810 was owned by Mississippi Valley Barge Line Company, it was discovered since completion of the testimony that said barge was actually owned by A. L. Mechling Barge Lines, Inc.

The work of loading the barges with pipe was accomplished with the aid of a locomotive crane owned by defendant and operated by its employee, which crane was situated on top of the loading dock and the boom of which had attached to it a cable with sling device for carrying the pipe (270a, 271a). The pipe was secured from railroad cars brought to the dock area. After the load was obtained in the railroad cars, the crane operator would make a lift transporting the load over the dock area and lower it into the barge. The distance from the crane down to the barge was about 25 feet (271a).

Prior to plaintiff's being employed on the barges in question, said barges had been towed to defendant's landing by towing companies (174a). Said barges were placed at defendant's dock for the purpose of having them loaded with pipe and shipped by means of towing companies to various destinations. Although defendant did have limited possession and control of these barges while they were tied up at its landing for loading purposes, defendant had no authority to repair or maintain them and had no towing facilities for moving the barges (174a). Defendant's employees, however, did place navigation lights on the barges while they were tied to its landing, removed water from the barges if any accumulated therein and by means of pulleys could move the barges a short distance in its own dock so as to facilitate the loading thereof.

The plaintiff was one of a crew of four pipe loaders, the duties of which were to receive the pipe in the barge, unhook the slings, roll the pipe into place, secure the cargo and perform other miscellaneous functions in order to load the pipe into the barge and ready

the same for shipment. Other members of the pipe loading crew were Phillip Harrison, Joseph Fani and Robert Hamar, all employes of the defendant (165a, 166a).

The plaintiff and his witnesses, Phillip Harrison and Joseph Fani, contend that plaintiff's accident took place on February 13, 1967 between the hours of 11 p.m. and 7 a.m., while they were working for defendant on a jumbo barge owned by Ohio Barge Line, Inc. (34a, 49a, 57a, 65a). They contend that the accident took place as a sling loaded with pipe was being lowered into a partly loaded barge, the lift struck the edge of the barge and the wall of the dock all of which caused the plaintiff to jump from the tier of pipe upon which he was standing and fall on an accumulation of ice on the floor of the barge. Although Robert Hamar was working with plaintiff at the time involved, he testified that he knew of no accident befalling plaintiff at any time (353a, 354a).

The defendant contends herein that (1) plaintiff at no time sustained an accident while employed on any barge; (2) that since the barge upon which plaintiff alleges he was injured was owned by A. L. Mechling Barge Lines, Inc., defendant owes plaintiff no duty to provide him with a seaworthy vessel; and (3) that defendant's liability to plaintiff, if any, is for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 USCA § 901).

After testimony on behalf of the plaintiff had been completed in this case, defendant filed a Motion to Dismiss setting forth therein various reasons why defend-

ant was not laible to plaintiff in the within cause of action (159a). After argument thereon the lower court refused defendant's motion (160a).

This action was tried before Wallace S. Gourley, Senior District Judge, without a jury. On May 1, 1970 the court filed its Opinion, including findings of fact and conclusions of law and ordered that judgment be entered in favor of the plaintiff and against the defendant in the total amount of $95,000 (383a, 399a).

On May 11, 1970 defendant filed a motion requesting the court to alter, amend and set aside certain findings of fact and conclusions of law and judgment or, alteratively, for a new trial. After a hearing was held thereon the court entered an order dated June 3, 1970, reaffirming its findings of fact and conclusions of law entered on May 1, 1970 and denied defendant's motion in all respects (399a).

The Court of Appeals for the Third Circuit filed its per curiam opinion on June 21, 1970 affirming the judgment of the District Court. A timely petition for rehearing in banc was later filed by your petitioner herein but the same was denied on July 20, 1971. Under date of July 28, 1971 the Clerk of the Court of Appeals mailed to the parties involved a true and correct copy of the Court's judgment with costs taxed against your petitioner which was issued in lieu of a formal mandate.

REASONS FOR GRANTING THE WRIT

The Rulings Below Conflict With the Decisions of This Court and the Decisions of Other Courts of Appeal and Significantly Affect the Shipping Industry, Especially in the Inland Waters.

In the case of *Reed v. Yaka,* 373 U.S. 410, 10 L.Ed.2d 448 (1963), this Court for the first time held that a bareboat charterer was presumably liable for the unseaworthiness of the chartered vessel. In that case your Honorable Court stated at page 413 as follows:

> "Pan-Atlantic was operating the Yaka as demisee or bareboat charterer from Waterman. Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner pro hac vice. We have no doubt, and indeed Pan-Atlantic admits, that, barring explicit statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel in rem against the vessel. . . ."

Prior to that decision the vessel owner alone owed to the longshoreman the nondelegable obligation to maintain a seaworthy vessel and as a result the longshoreman had the right to sue the vessel owner *in per-*

sonam or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 424, 5 L.Ed.2d 169 (1960).

In the case of *Jackson v. Lykes Steamship Company*, 386 U.S. 731, 18 L.Ed.2d. 488 (1967), this Court held that a longshoreman could sue his employer for the ship's unseaworthiness if said employer was the owner of the vessel, and, under those circumstances, the longshoreman was not relegated to the provisions of the Longshoremen's and Harbor Workers' Compensation Act as his exclusive remedy. In the within case there was no evidence of a demise or other form of charter between the owners of the barges involved and your petitioner herein. The barges involved were tied up in your petitioner's landing only for the purpose of having them loaded with pipe manufactured by your petitioner and they were at all times tied to said landing in order to facilitate loading. Your petitioner had no authority, nor was there any proof thereof, to navigate these barges except within the very narrow confines of its landing for the purposes of loading. The barges admittedly were owned by third parties which fact was testified to by the plaintiff and his witnesses. Although your petitioner did have temporary possession and control of the barges in question while the same were tied up and being loaded at its landing, your petitioner had no authority to navigate the same and no authority to make repairs thereto. In the case of *Guzman v. Pichirilo*, 369 U.S. 698, 8 L.Ed.2d 205 (1962), this Court held that in order to create a demise the owner of the vessel must completely and exclusively relinquish possession, command and navigation thereof to the demisee; that

a demise is therefore tantamount to, though just short of, an outright transfer of ownership. Anything short of such a complete transfer is a time or voyage charter party or not a charter party at all.

In its opinion affirming the judgment of the District Court in the instant case, the Court of Appeals cited the case of *Aird v. Weyerhaeuser SS Co.*, 169 F.2d 606 (3d Cir., 1948). In that case the question arose as to whether under a general agency service agreement a steamship company's authority as United States Agent to conduct business of vessels assigned to the company did not include control of navigation and management of the vessel or whether the company's responsibility was limited to that of "ship's husband". In his opinion, Circuit Judge Maris, at pages 609-610, explains the difference between a demise charter and a charter party. At page 611, however, he states as follows:

> ". . . On the other hand, however, are those demise charters under which the charterer is given sole possession and control of the vessel for the voyage or service which is contemplated. As we have seen it is only in the case of a charter of the latter sort that the charterer becomes owner pro hav vice and liable for the seamen's wages. There is, however, a general presumption that the owner does not mean to put his vessel into the possession of the charterer to this extent. Accordingly Aird would not be justified in relying upon the statement in the articles that Weyeshaeuser was charterer as a basis for holding it liable as his employer."

Reasons for Granting the Writ.

We sincerely believe that the Court of Appeals in the instant case was in error in citing Judge Marris' opinion as its basis for affirming the District Court in the instant case. The evidence in the instant case was not such that your petitioner could be considered to be a charterer of the barges involved and thus become owner *pro hac vice*. As stated in the opinion of Judge Maris, there is a general presumption that the owner of a vessel does not mean to put his vessel into the possession of the charterer to that extent. Since the barges in question were admittedly owned by third parties the burden of establishing necessary ingredients to constitute owner *pro hac vice* was upon the plaintiff in this case. There is no evidence establishing these necessary ingredients in the record in this case except that the barges involved had temporarily been placed in your petitioner's landing for loading.

We believe that the instant case is governed by the facts and law involved in *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir., 1967); cert. denied 389 U.S. 927 (1967) and the case of *Thomas v. Peterson Marine Service, Inc.,* 411 F.2d 592 (5th Cir., 1969); cert. denied 396 U.S. 1006. In the latter case the plaintiff was employed by defendant in the hold of the S/T MOBIL ACME, a vessel owned by Mobil Oil Corporation. At the time of his injury he was scooping excess coconut oil from the hold and his employer had exclusive control of that part of the ship. Plaintiff filed an action for damages under the Jones Act and general maritime law against his employer and the District Court granted summary judgment in favor of the employer. In affirming the granting of the summary judg-

ment in favor of the employer in its per curiam opinion, the court at page 593 stated as follows:

> "To exhaust appellant's possibilities for a suit in admiralty against his employer, we hold that as a longshoreman he is not entitled to sue Peterson Marine for the unseaworthiness of the vessel under the doctrine fashioned for longshoremen in Seas Shipping Company v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872 90 L.Ed. 1099 and Reed v Steamship Yaka, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448. An injured longshoreman who was doing work traditionally done by seamen can maintain an action for unseaworthiness, but such action must be against the vessel *in rem* or the owner of the vessel and cannot go directly against a stevedore-employer having no ownership or operational interest in the vessel. We so held in Watson v. Gulf Stevedore Corp., 5th Cir. 1967, 374 F.2d 946.
>
> "The summary judgment is in all respects affirmed."

The instant case is an important one to the shipping industry which uses our waterways, particularly the inland waterways, where thousands of barges are used in commerce on a daily basis. These barges are constantly used to carry cargo up and down the rivers and are deposited at landings for various periods of time, in connection with loading and unloading operations. Only in rare occasions does the landing operator who takes temporary custody of the barge have an operational or navigational interest in the barge, his sole interest being the loading or unloading of the barge in question. The barges are towed into and out of the

landing in question by third parties. Query: Does the landing operator who is not the owner of the barge in question and under such circumstances owe to the longshoreman who may be employed thereon the nondelegable obligation to maintain a seaworthy vessel? We do not believe it was ever intended or has previously been held that such temporary custody and control of a barge by the landing operator was ever intended to place upon him the liabilities of an owner *pro hac vice.* We submit that it is unreasonable to place such a heavy burden upon all such parties whose relationship to myriad barges is at most brief and temporary. The landing operator at most is no more than a bailee of the barges in question.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals affirming the award of damages by the District Court.

Respectfully submitted,

REED, SMITH, SHAW & MCCLAY
GILBERT J. HELWIG
IRA R. HILL
Attorneys for Petitioner

October 16, 1971

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,214

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION,
Appellant

(D. C. Civil Action No. 67-1363)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 3, 1971
Before McLAUGHLIN, ALDISERT and GIBBONS,
Circuit Judges

Opinion of the Court
(Filed June 21, 1971)

PER CURIAM:

This appeal requires us to decide whether a bailee in exclusive possession of a river barge is an owner *pro hac vice* and thus liable for injuries to a stevedore whose injuries resulted from unseaworthiness of the vessel. The district court found that appellant was such an "owner" and awarded damages to appellee.

The barge was towed by a river boat company to appellant's dock in a river harbor. It was tied to the dock along with other barges and left in appellant's possession for the purpose of loading it with pipe. After tying up the barge, the boat company left the area. Barge handlers, employed by appellant, were responsible for movement of the vessel from various locations in the harbor by means of pulleys. Their duties also obliged them to place night warning lights on the moored barge.

Plaintiff, an employee of appellant, was one of four loaders whose job required him to receive the pipe which was lowered from the dock into the barge by crane. The loaders were to unhook the pipe from the crane sling and roll it into place on the barge. There was testimony that plaintiff was injured when the crane sling struck the side of the barge and the wall of the dock, causing him to jump from the tier of pipe on which he was standing and fall on an accumulation of ice on the deck of the barge. It was averred, and the district court found, that the accumulation of ice and the absence of sufficient illumination to disclose the presence of ice constituted unseaworthiness.

In *Aird v. Weyerhaeuser S. S. Co.*, 169 F.2d 606, 609-10 (3 Cir. 1948), this court stated:

> If the owner of the vessel has given entire possession and control of it to another *by virtue of a demise charter or otherwise* . . . the person thus put in possession and control of the vessel becomes special owner. . . . Such a person is frequently described as "owner pro hac vice" which is merely a convenient expression to indicate that he stands

in the place of the owner for the voyage or service contemplated and bears the owner's responsibilities, even though the latter remains the legal owner of the vessel.

(Emphasis supplied.)

There being no showing of an agreement between the owner of the barge and the appellant inconsistent with a demise, see *Banks v. Chas. Kurz Co.*, 69 F. Supp. 61, 66 (E.D. Pa. 1946), and there being sufficient evidence to sustain the district court's finding that appellant had possession and control of the barge, a finding which we do not consider clearly erroneous, *Speyer v. Humble Oil and Refining Co.*, 403 F.2d 766 (3 Cir. 1968), we are persuaded that the district court did not err in holding appellant liable as an owner *pro hac vice* for injuries sustained by a stevedore. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Reed v. The Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967).

We have considered the other contentions presented by appellant and find them to be without merit.

The judgment of the district curt will be affirmed.

A True Copy:

Appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION
No. 67-1363
In Admiralty

OPINION

WALLACE S. GOURLEY, Senior District Judge

This is an admiralty action brought by plaintiff to recover damages for personal injuries allegedly sustained by him while working on a vessel in the course of his employment as a stevedore or barge-loader for the defendant. A sole cause of action is asserted under the maritime doctrine of seaworthiness. Following the completion of pre-trial proceedings, a non-jury trial was conducted by this member of the Court. The testimony has been completed, the transcript filed, and proposed findings of fact and conclusions of law have been submitted by counsel for the respective parties. Based upon the complete record, I am of the opinion that judgment must be awarded in favor of plaintiff and against defendant. In support thereof, the Court sets forth the following:

FINDINGS OF FACT

Jurisdiction and Liability

1. Plaintiff was first employed by defendant at its National Tube Works in McKeesport, Pennsylvania, on December 29, 1964, as a pipe loader in the shipping

department. Prior to February 7, 1967, his work had always been performed in the plant or surrounding area, on the land or on railroad cars. Before the date of his accident he had never worked on a barge.

2. On February 7, 1967 and February 8, 1967, defendant assigned plaintiff to assist in loading pipe in barges moored in the Monongahela River at the defendant's barge-loading work between the hours from 3 P.M. to 11 P.M.

3. The Monongahela River is a navigable waterway of the United States.

4. The barges on which plaintiff worked on both dates were designated as MBL 810, OBL 388 and OBL 465. Of these only MBL 810 was a jumbo (large sized) covered (having movable lids) type barge.

5. Plaintiff's accident occurred during the performance of barge work on February 7, 1967. It was cold and after dark when the events took place which are the subject of this litigation. The barge being loaded at the time was a jumbo covered barge designated as MBL 810.

6. The work of loading the barge was accomplished with the aid of defendant's locomotive crane which was stationed on the dock and the boom of which had attached to it a cable and sling for carrying pipe. Defendant's crane operator would lift a load of pipe from railroad cars brought to the dock area, transport the load over the dock area and lower it into the barge. On an average, the crane carried a load of about ten tons. The distance from the top of the dock to the bottom of the barge was approximately twenty-five feet.

7. The plaintiff was one of a crew of four pipe loaders, the duties of which were to receive the pipe as lowered from the dock to the barge, unhook the slings, roll the pipe into place, place spacers, secure the cargo and perform other miscellaneous functions in order to accomplish the loading of pipe in the barge.

8. In order to perform his duties, it was necessary for the plaintiff to be in the bottom of the barge. It was neither feasible nor possible for him to leave the bottom of the barge during the time a lift was being made, there being no means of egress afforded.

9. Plaintiff had never been instructed concerning barge loading operations and was unfamiliar with the procedures followed or events that could be expected to arise during loading.

10. The pipe was being loaded in the barge in several tiers. Plaintiff was working on top of the first tier of pipe along with Harrison and Hamar. Fani was laying bearings strips in the second tier in which there was some pipe.

11. Between the tiers was an open space.

12. The distance from the top of the tier of pipe upon which plaintiff was standing to the floor of the barge between the two tiers of pipe was six to eight feet.

13. On the floor of the barge in the space between the tiers there was an accumulation of ice six to eight feet long and four feet wide, or at least four feet in diameter.

14. Although one of the fellow employees had discovered said icy condition plaintiff had not been told

about said condition nor had he noticed or seen the same. This was unquestionably due to the poor and insufficient lighting in the loading area and more particularly on the barge vessel.

15. The lighting was such that various areas of the barge were in shadow or darkness. Although there were lights on the dock wall and upon poles situated on the dock, there were no lights on the barge for illuminating the work area. Portable or artificial lights were not placed or temporarily installed on said barge or any other barges being loaded. In fact, it was the defendant's practice not to do so in any barge being loaded.

16. The accident occurred as a sling loaded with pipe was being lowered into the barge. As the lift was brought down, a swing began to develop. The lift banged or struck the edge of the barge, then contacted or was brought up against the wall of the dock, and then started down into the barge.

17. Harrison, who had fourteen years experience and was working with plaintiff on top of the tier, thinking that the lift might "get away", ran to the outside corner of the barge where he knew he would be out of reach of a swinging lift. Hamar also went to this location.

18. Plaintiff, fearing that the load would break loose and fall upon him, jumped from the tier of pipe on which he was standing to the floor of the barge and landed on the accumulation of ice which was in the area between the tiers. He slipped, landing in a sitting position and his head jerked back. As a result, he was injured.

18. Although it was customary for a locomotive-crane operator, on occasion, check the swing in a lowered lift by bringing the lift gently against the barge wall, plaintiff, inexperienced and uninstructed in barge operations, honestly believed he was involved in a sudden emergency as a result of the course of the swinging lift, both before and after it struck the barge wall. Plaintiff was never told, informed or advised of said custom. The sudden emergency in which the plaintiff become involved was not the result of his own neglect or lack of care in any way whatsoever.

20. The ownership of the barge vessls has not been firmly established, although it appears certain that it was not owned by defendant at the time of the accident. This fact is immaterial, in my considered judgment. It matters not whether the defendant was the owner, charterer, lessee or bailee of the barge vessel or whether defendant had a right of possession on an hourly, daily, yearly or monthly basis. Since the barge vessel was in the sole and absolute control of the defendant, liability for the unseaworthy condition must exist against said defendant.

21. At and prior to the time of the accident, the barge in question was one of a group of barges at the defendant's plant. It was one of five barges moored in the loading area.

22. The barges are customarily delivered to the defendant by river boat companies. They may be tied up either by a river boat company crew or by defendant's own crew of barge handlers. After the barges are tied up, a river boat company's crew leaves.

23. The defendant's barge handlers have different duties than the barge loaders and are directed by defendant's supervisors. Their duties include moving the barges. Defendant's barge shipper has the responsibility of directing the placement of the barges for loading at appropriate times. To accomplish this purpose he contacts the supervisor of the crew of barge handlers who are then charged with the duty of moving the barges from a given location within the river loading area where they may be moored to the specific location adjacent to the dock where they may be loaded. This movement is accomplished with the use of pulleys, drawn upon manually or by locomotive crane, but without the use of motor-powered vessels.

24. Defendant's barge handlers are responsible for the maintenance of the barges themselves to the extent that they have duties of pumping out the barges with a steam pump if they are found to be accumulating water and of placing red navigational warning lights upon the barges.

Damages

25. The medical testimony is most substantially disputed as to the injuries sustained, the present condition of plaintiff, and his ability to pursue regular and steady employment in the type or class of work for which he is mentally and physically qualified and experienced.

26. Although over a period of years plaintiff had been involved in some motor vehicle accidents, he sustained no substantial injury in any of them, had never sustained any injury to his neck or back and was in excellent health prior to the accident.

27. While plaintiff reported the accident belatedly to his superiors, the accident was known to plaintiff's fellow barge-loaders. A more prompt report of the accident could not have been expected because plaintiff's initial symptoms and pain were not localized in the specific areas in fact injured, and a causal connection between the accident and injury was not discovered by plaintiff until later.

28. Plaintiff's work record prior to the accident was good, he being a willing and cooperative worker at all times.

29. As a result of the accident, plaintiff sustained an injury to the neck for which he has received medical treatment to date, principally from the following doctors: Dr. C. Ramaswamy, Dr. Patrick G. Laing, Dr. James Rosen and Dr. Ruber Tenicella.

30. Dr. Ramaswamy first saw plaintiff on February 20, 1967. Dr. Ramaswamy immediately prescribed cervical traction and thereafter caused the plaintiff to be admitted to the Charleroi-Monessen Hospital on two occasions with a diagnosis of herniated cervical disc. During the first hospitalization plaintiff was treated with cervical traction, medication and physiotherapy. During the second hospitalization, his neck pain having grown worse, he had further conservative therapy followed by surgery during which a herniated disc at the level of C6 and C7 disc space was removed by anterior surgery. A fusion graft was obtained from the hip region and applied to the area of disc removal. He was followed by Dr. Ramaswamy after his discharge from the hospital, having continuing complaints of pain in

the left shoulder, arm and fingers which were not relieved.

31. Dr. Ramaswamy received a belated history of plaintiff's accident but was definitely positive that Mr. Blair's problem was secondary to the injury and that his condition was caused by the accident.

32. Plaintiff next came under the care of Dr. Laing, another orthopedic surgeon, on October 30, 1967. He caused Mr. Blair to be hospitalized also on two occasions at Presbyterian-University Hospital, on the first of which a manipulation of the cervical spine was performed and other procedures, such as traction and physiotherapy, administered. This was done to alleviate plaintiff's pain in his neck, shoulders and left chest. When improvement was not maintained, he was again hospitalized for further studies and physiotherapy and a Mayo-type cervical collar was prescribed. The diagnosis made by Dr. Laing was cervical degeneration with nerve root pressure. In his opinion, also, this condition was caused by the accident and is not relievable by further operations or other procedures.

33. Dr. James Rosen, a neurologist, also attempted to treat plaintiff for his continued posterior cervical pain, left upper extremity and chest. He caused plaintiff to be re-hospitalized for further studies, including a myelogram, and subsequently arranged for the plaintiff to undergo various nerve blocking procedures by Dr. Tenicella. In his opinion, plaintiff's condition was caused by the trauma of the accident and was diagosed as chronic post-traumatic syndrome with cervical fibro-myositis. In spite of the nerve blocks, plaintiff's painful condition has not been relieved, the

nerve blocks administered having afforded Mr. Blair only temporary relief.

34. Although continued nerve blocks hold out some slim prospect of relief, they are attended with grave risk of paralysis or death and are not recommendded at least without very extensive supportive measures.

35. Plaintiff's condition is permanent.

36. As a result of the fusion operation, plaintiff's ability to turn his head is limited on either side to the extent of fifteen or twenty degrees.

37. Because of his injuries, plaintiff is permanently incapacitated from performing heavy work. Because of the pain he now experiences, he is also unable to engage in any sustained kind of physical activity even of a light nature which involves physical exertion.

38. By reason of his residual disability and/or the performance of surgery as revealed by the presence of a cervical scar, it will be difficult for plaintiff to secure a job.

39. Plaintiff had completed only eight grades of formal education. His entire work history prior to his employment by defendant had involved work of heavy nature such as laborer, gas station attendant, truck driver, factory worker, steel hauler, construction worker and cattle hauler.

40. Since the accident has activities have been limited to doing work around his yard and house cleaning. He attempts to work and can only do so for a short period of time before developing pain and stiffness

which require him to stop. The pain he experiences is constant and often keeps him awake at night.

41. Plaintiff experienced extreme pain before, during and following his five hospitalizations and the administration of various procedures such as myelogram and nerve blocks. His pain has been on a regularly recurring basis from the date of the accident to the present and will continue in the future.

42. Because of his injuries, plaintiff lost work from February 18, 1967 and has been continually unable to work thereafter. As of the date on which the trial was completed, November 7, 1969, he had been absent from work two years and approximately eight and one-half months. The plaintiff's hourly rate as a pipe loader at the time of the accident was $2.604 per hour. In the year immediately preceding the accident (from pay period ending January 8, 1966 to pay period ending January 7, 1967) he had earned, according to the defendant's records, $5,465, an average of $455 per month. On such basis, his wage loss as of November 7, 1969, the date of completion of the trial, was approximately $14,597.

43. By reason of his long absence from his work, his service with the defendant has been terminated because of agreements governing employees between the company and the union. In order to be re-employed by United States Steel Corporation, he would have to submit an aplication as a new employee and pass a physical examination. He would not be employed by defendant.

44. The plaintiff was born on February 3, 1931. He was thirty-eight years old at the time of trial, having, according to Life Tables published by the United

States Department of Health, Education and Welfare, an expectancy of 33.4 years. Plaintiff's retirement from defendant's service was mandatory at age seventy, although after age sixty-five continued employment was subject to his passing semi-annual physical examinations. His work life expectancy was thus thirty-two years. Plaintiff's proved earning capacity was $5,465 per annum and on that basis his gross future earnings, except for his disability, would be $174,880. The present worth of $5,465 per annum for thirty-two years at a discount rate of five and one-half percent is $81,451.45*.

45. Plaintiff incurred extensive bills in connection with the rendition of necessary medical and surgical treatment for his injuries and for numerous hospitalizations in the total sum of $5,188.84. The aforementioned bills were directly related to the plaintiff's injuries and all were established by proper evidence as being necessary to further the plaintiff's recovery and were reasonable in amount.

CONCLUSIONS OF LAW

Jurisdiction and Liability

1. This Court has jurisdiction pursuant to Title 28 U.S.C. §1333.

2. Barge MBL 810, although without motor power of its own, was a vessel within the meaning of the Maritime Laws of the United States. *Norton v. Warner Co.*, 321 U.S. 565, 64 S.A. 747, 88 L.Ed 931 (1943).

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*Factor 14.9042 taken from Present Value Tables published by Lawyers and Judges Publishing Co., Inc., Copyright 1968.

3. Unseaworthiness is created where a given condition temporarily renders the vessel, its equipment and appurtenances, unseaworthy, and no valid distinction is to be drawn between operational negligence and unseaworthiness. *Mascuilli v. United States,* 387 U.S. 237, 87 S. Ct. 1705, 18 L.Ed. 2d 743 (1967), *Canadians v. Moore-McCormack Lines, Inc.* 382 F.2d 961 (2d Cir. 1967) *cert. den.,* 390 U.S. 1027 (1968), *Alexander v. Bethlehem Steel Corporation,* 382 F.2d 963 (2d Cir. 1967), *cert. den.,* 393 U.S. 1064 (1969).

4. The duty to provide a seaworthy vessel includes a duty to provide both seamen and longshoremen with a safe place to work and this obligation extends to stowage where men perform loading and unloading. *Venable v. A/S Det Forenede Dampskibaselskab,* 399 F.2d 347 (4th Cir. 1968).

5. On February 7, 1967, plaintiff suffered an accident and injury which were caused by the following conditions, each of which rendered the vessel unseaworthy:

(a) An accumulation of ice on the floor of the barge in the area between the tiers on one of which the plaintiff was working;

(b) The absence of lights upon the barge itself which were necessary in order to illuminate the entire area and which would have eliminated areas of darkness in which it was likely that dangerous icy and slippery conditions would exist. The need for such additional lighting on the barge itself was increased due to insufficient lighting emanating from the dock and because, under defend-

ant's practices, no effort was made to eliminate ice from the interior of the barge.

6. The barge vessel on which the plaintiff sustained his injuries was not owned by the defendant. It was, however, in the exclusive control and possession and under the direction of said defendant. Regardless of the basis for its possession, the defendant is responsible for its unseaworthy condition and for the injuries and damages arising from said lack of seaworthiness.

7. By virtue of performing functions of moving barge MBL 810 and others within the dock area, pumping the barges when excess water accumulated, and maintaining navigational lights upon said barges, defendant exercised a possession and control of said vessels exceeding that delegated to a mere bailee and acquired an operational and navigational interest in said vessels. *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir. 1967), *cert. den.,* 389 U.S. 927 (1967), *Petition of Shaver Transportation Company,* 287 F. Supp. 339 (D. Oregon 1967), *Mach v. Pennsylvania R. Co,* 207 F. Supp. 233, (D.C. Pa. 1962), *aff'd* 317 F.2d 761 (3rd Cir. 1963)

8. In view of the defendant's possession, control and use of the unseaworthy barge vessel, it had an operational and navigational interest therein. Since the plaintiff was performing navigational and operational as well as stevedoring functions, it is liable to plaintiff in damages for unseaworthiness under the decision of the Supreme Court of the United States in *Reed v. The Yaka,* 373 U.S. 410, 83 S. Ct. 1349.

Damages

9. According to the weight of the medical testimony, plaintiff must be considered to have a disability which is partial and permanent, precluding plaintiff from both heavy and most light physical work. His economic horizon is most limited in the competitive industrial market.

10. The plaintiff has incurred great medical and hospital expenses, has lost substantial wages, has a substantial permanent partial disability, and has, is and will continue to experience throughout the span of his life most grievous and nerve racking pain, suffering and inconvenience which is substantially aggravated on sustained physical effort and application of the use of the physical functions of his body.

DISCUSSION

The law is settled that the owner of a vessel or bareboat charterer is responsible in damages for unseaworthiness to an employee-longshoreman who is injured while engaged in loading a vessel on behalf of said owner or charterer. *Reed v. The Yaka,* 373 U.S. 410, 83 S. Ct. 1394, 10 L.Ed. 2d 1962).

It is also well recognized that a ship owner's warranty of seaworthiness extends to a longshoreman while loading a vessel even where employed by an independent contractor. *Seas Shipping Co. v. Vieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099 (1946).

In determining whether to extend the doctrine heretofore enunciated to the facts in this case, the Court has considered what must be brought to the fore-

front at all times—the humaritarian policy of the doctrine of seaworthiness.

Consideration must be given to the hazards of marine service, the helplessness of the men to learn or know of, and ward off, the perils of unseaworthiness, especially in the night time and when sudden emergencies arise during the performance of their duties and the furtherance of the business interests of their employer.

It must also be remembered that the doctrine of seaworthiness cannot be held to depend upon any kind of contract between the owner of the vessel or barge. I believe that the person, individual or corporation who has not only a bailee's custody but also operational and navigational control of a vessel is subject to the doctrine of seaworthiness. This should be true regardless of the formal contractual relationship which exists between the owner of the vessel and the person having the aforementioned degree of control when a person working on the vessel is involved in an accident and injured.

The plaintiff in this proceeding, who was an employee of the defendant and was injured while working on a barge, cannot be denied the traditional and basic protection of the warranty of seaworthiness because the defendant, U. S. Steel Corporation, was not the owner or charterer of the vessel.

I, therefore, conclude that the defendant, which had the operational and navigational control over, as well as the possession, custody, use and management of the barge, is subject to and responsible under the seaworthiness doctrine.

To find otherwise would be to permit the remedial effects of the doctrine of seaworthiness to be limited or escaped by formalistic contracts, agreements, arrangements and understandings. This cannot be permitted, since the duty to provide a seaworthy vessel is rooted, not in contracts, but in the hazards of the work of the person required to go upon the vessel to perform duties and pursue his employment at all times of the day and night and varying conditions and circumstances. All such persons are subject to the same dangers and are entitled to like treatment under the law regardless of what the business relationship might be between an owner of a barge and a person who has operational and navigational control of said vessel. A person injured on a vessed should not be placed in a position where he is playing "Russian roulette", so to speak, as to what the relationship might be between the owner of the vessel and his employer at the time the employee is involved in an accident and injured.

Under the Federal Employers Liability Act, a railroad using equipment which is defective is responsible for injuries sustained by its employees regardless of the ownership of said equipment by a third person where it is defective and not suitable or fit for the purposes intended. *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1962). I fail to see or find any reason why the same rule of law should not be applied or exist where a person is injured on a vessel which is in navigation on the inland waterways, that is at dock side for the purpose of being loaded, where an accident occurs and injuries are sustained as a direct result of the unseaworthy condition of said barge vessel.

It is therefore concluded that the employee of the defendant corporation is entitled to the application of the doctrine of seaworthiness to his employer.

ORDER

Now, this 1st day of May, 1970, it is hereby ORDERED that judgment be entered in favor of plaintiff and against defendant in the total sum of $95,000, in compensation for plaintiff's medical and hospital expenses, past wage loss, pain and suffering, and loss of earning power resulting from a permanent partial disability.

/s/ WALLACE S. GOURLEY, SDJ

Senior District Judge

cc: PAUL E. MOSES, Esquire
EVANS, IVORY & EVANS
711 Frick Building
Pittsburgh, Pennsylvania 15219

REED, SMITH, SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15230

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,214

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION,
Appellant

(D. C. Civil Action No. 67-1363)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, ALDISERT and GIBBONS,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 1, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS QUINN
Clerk

June 21, 1971

Costs taxed in favor of appellee as follows:

Brief for appellee.....$174.90

Certified as a true copy and issued in lieu of a formal mandate on July 28, 1971.

TEST:

THOMAS F. QUINN
Clerk, United States Court of
Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL E. MOSES,
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RULES

Rule 21, Rules of the Supreme Court 6, 8, 14

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The Law of Admiralty, Gilmore & Black, copyright 1957 9

QUESTIONS PRESENTED

1. Whether an employee performing stevedoring work on a barge may maintain an action against his employer for injuries resulting from unseaworthy conditions on the vessel where the employer was in the sole and exclusive control of the barge and on factual evidence as to its use, maintenance and operation of the barge was found to have an operational and navigational interest therein and to be the owner *pro hac vice* thereof.

2. Should the petition for certiorari be denied because of the failure of the petitioner to comply with the provisions of Rule 21 of the rules of this court.

RULES INVOLVED

The Rules which the respondent's second question involve are Supreme Court Rules 21 and 22, relevant portions of which are set out in the appendix hereto at page 16.

STATEMENT

The respondent, employed ordinarily by the petitioner as a land based worker in the Shipping Department of its National Tube Works, was, on February 7, 1967, instructed by the petitioner to work as a member of a crew of barge loaders. His accident occurred after darkness on that date. He was working, pursuant to the orders of his superior, inside the barge which was being loaded with pipe manufactured by the petitioner and destined for its customers.

The barge was located adjacent to the dock at the petitioner's plant in the Monongahela River, a navigable waterway. A crane was being employed to lift the various loads of pipe into the barge where the pipe was stacked in tiers. There were unguarded openings between the tiers. On one of the lifts the craneman appeared to lose control of the load and the pipe banged against the wall or side of the dock above the barge. Fearing that the pipe would fall on them the men working in the barge scattered and to avoid injury respondent jumped from the tier of pipe on which he had been located onto the floor of the barge six to eight feet below. There was an extensive accumulation of ice on the surface of the barge at this point which the lack of proper illumination prevented respondent from seeing. Respondent landed on the ice; his feet slid out from under him and he fell and was injured. Respondent maintained that the ice, lack of illumination, absence of guards between the tiers, and a defective condition of the crane caused or contributed to the occurrence and that each of the foregoing conditions rendered the vessel unseaworthy.

Statement.

The district court in admiralty heard the evidence and made extensive findings of fact and conclusions of law. On the basis of the evidence, it found that on February 7, 1967, respondent suffered an accident and an injury caused by the unseaworthy condition of the vessel created by (a) an accumulation of ice in the cargo hold, and (b) the absence of lights upon the barge itself which would have illuminated the whole work area and eliminated the area of darknes in which the icy condition existed (394a).

The possession and control of the barge by the petitioner was proved. Its ownership was not. In fact, petitioner had incorrectly identified the owner in the answers to interrogatories. On the question of use, possession and control, it was shown that the barge was one of the group of five moored at the petitioner's loading area (154a). These had been delivered to the petitioner by a river boat company which, after either tying up the barges or putting them in the control of the petitioner's own barge handlers, left the area (174a, 196a). The barge was then in petitioner's sole possession and control. Barge handlers employed by petitioner thereafter performed all the necessary maintenance and navigational functions with respect to the barges. Petitioner's barge shipper had the responsibility for directing the transportation of the barges from their berths to the loading area at appropriate times. To accomplish this he would contact the supervisor of the barge handler crew whose duty it was to navigate the barges from their location to the point where the pipe could be loaded. The barge handling crew constantly or recurrently performed all of the physical work necessary to transport the barge in the river from the place of original moor-

ing to the point where the crane crew loaded it (346a-348a). According to the defendant, this movement was not done by motor vessels, but by means of pulleys. The means and methods by which such navigation was accomplished was determined solely by petitioner. In addition to the performance of this navigational function, the members of the barge handling crew were responsible for the barges themselves and had pumps with which they would pump out barges found to be leaking (347a). The duties of the barge handlers also obliged them to put out on the barges the warning lights required at night time under the inland rules (21a).

The district court found that the vessel involved was in the sole possession and control of the petitioner and under its direction. It found that by virtue of performing functions of moving the barges within the dock area, pumping the barges when excess water accumulated, and maintaining navigational lights on the barges, the petitioner exercised possession and control exceeding that of a mere bailee, and acquired an operational and navigational interest in the vessel (394a-395a). Since the petitioner was performing navigational and operational as well as stevedoring functions, it was held liable to respondent for unseaworthiness under *Reed v. Yaka,* 373 U.S. 410 (1963).

The Court of Appeals affirmed the judgment of the District Court, *per curiam* noting that the District Court did not err in holding petitioner liable as an owner *pro hac vice* for injuries sustained by a stevedore. A petition for rehearing was denied on July 20, 1971.

Exactly ninety days later (on October 18, 1971) the petitioner filed with the clerk of this Court a single type-

written petition for certiorari. Petitioner filed no proof of service on counsel for respondent. No service of the typed petition had in fact been made on counsel for respondent.

On October 20, 1971, the ninety-second day following the entry of the order refusing a rehearing by the Court of Appeals, petitioner served upon counsel for respondent three printed copies of the petition for certiorari. On the same day it filed its printed petitions with the clerk of the Court* together with proof of service reciting therein that service of the same had been made on counsel for respondent on October 20, 1971. Petitioner did not serve upon counsel for respondent the notice provided for by Rule 21(3).

The service made upon counsel for respondent on October 20, 1971, was the initial and only service upon him of the petition for certiorari.

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*The date of docketing, October 18, 1971, is stamped on the printed copies of the petition. However, counsel for petitioner was informed by counsel for respondent that only the printed petition was filed on that date, an arrangement having been made with the office of the clerk for the filing of the printed petition no later than October 20, 1971.

SUMMARY OF ARGUMENT

This is not a case in which review on certiorari is justified. The issue involved turns upon a factual determination and the correctness of the factual determination made by the District Court and concurred in on review by the Court of Appeals. That finding was to the effect that the petitioner had an operational and navigational interest in the vessel involved, had absolute possession and control thereof, and was the owner *pro hac vice.*

The decision is consistent with the decision of this Court in *Reed v. Yaka,* 373 U.S. 410 (1963) by which an owner *pro hac vice* becomes liable to its employees for injuries caused by the unseaworthiness of a vessel within its possession and control. There is no conflict between the decision of the Court of Appeals in this instance and the decision by the Court of Appeals for the Fifth Circuit in *Watson v. Gulf Stevedore Corp.,* 374 F.2d 946 (5th Cir., 1967) as the petitioner asserts. The last mentioned decision was based upon the finding that the employer had no ownership or operational interest in the vessel, whereas here it was found that the petitioner had navigational and operational interests and was the owner *pro hac vice.* Related cases imposing liability upon non-owner employers under the Jones Act, based upon possession and control, support the correctness of the decision of the Court of Appeals. That decision is in keeping with the broad humanitarian purposes of the seaworthiness doctrine.

There is no federal question presented by this case. It merely involves an application of the doctrine of

Reed v. Yaka, supra, to a factual situation and the decision turns on its own facts. Nothing in *Reed v. Yaka* excludes the application of the rule of that case to vessels used on inland waterways. No new rule of law is presented.

If, in fact, the question presented by the petitioner was of such compelling importance, petitioner would have perfected the filing of its petition for certiorari in the manner required by Rule 21 of the rules of this Court within the ninety days permitted by law for seeking a review. The petitioner did not request the Court in advance to extend the time for compliance with Rule 21 and has furnished no reasons which would justify the Court in its discretion to waive the formal mandatory requirements of Rule 21.

ARGUMENT

I. The Decision Turns on Its Own Facts.

It is apparent that petitioner's quarrel is with the factual determinations of the District Court which were reviewed by the Court of Appeals in the manner required by law. That Court held that on the facts presented the District Court did not err in holding the petitioner liable as owner *pro hac vice*. The District Court expressly found that petitioner had exclusive possession and control of the vessel which exceeded that delegated to a mere bailee, and acquired an operational and navigational interest therein. Petitioner embarks directly upon an attack on those findings and argues in the petition that it did not have such possession and control. Assuming the correctness of the factual findings concurred in by the courts below, petitioner as owner *pro hac vice* was the warrantor of seaworthiness. Should review be granted, this Court would necessarily be required to enter upon an analysis of the facts which two courts have already held support that conclusion. Traditionally, this Court has declined to assume such an obligation. *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, (1949).

II. There Is No Conflict of Decision.

It is well settled that complete possession and control of a vessel renders one owner *pro hac vice* and thus the warrantor of the seaworthiness of the vessel to seamen and longshoremen. So far as third persons are concerned, the vessel and those doing its work are his. Gilmore & Black, *The Law of Admiralty*, Copyright 1957,

pages 215-219. In *Reed v. Yaka,* supra, ownership *pro hac vice* was the incident of a formal bare boat charter which carried with it complete possession and control. In this case the finding of ownership *pro hac vice* rests on factual evidence showing the shifting of possession and control to petitioner to the same degree as in a bare boat charter or demise.

The petitioner complains that there was no evidence of a formal demise or charter. However, proof of formal demise or charter was not essential, there being sufficient factual evidence from which an oral charter could be inferred. If some other formal arrangement existed, the petitioner, who presumably knew of it, did not come forward with any such evidence. As the Court of Appeals held, there was no evidence inconsistent with a demise. Oral charters are common. *Cf. Petition of Shaver Transportation Co.,* 287 F. Supp. 339 (D. Ore., 1967) cited by the District Court; *Banks v. Charles Kurz Co.,* 69 F. Supp. 61, (E.D. Pa., 1946) cited by the Court of Appeals.

While petitioner had sole control and possession of the vessel it exercised, as found by the courts below, a wide range of activities with respect thereto. Petitioner's contention that it had no authority generally with respect to the barges is contradicted by the evidence as found. Thus, petitioner as owner *pro hac vice* stands in the place of the owner for the service contemplated and bore the owner's responsibilities. *Aird v. Weyerhaeuser S.S. Co.,* 169 F.2d 606, 611, (3d Cir., 1948).

Watson v. Gulf Stevedore Corp. 374 F.2d 946 (5th Cir., 1967) is not in conflict. There the employer oc-

cupied solely the position of a shoreside stevedoring company with no ownership or operational interest in the vessel and was consequently not liable for unseaworthiness. Here an operational and navigational interest was found along with exclusive possession and control.

Decisions under related provisions of law support the correctness of the holding of the courts below. On the following facts, in *Mach v. Pennsylvania Railroad Co.*, 317 F.2d 761 (3rd Cir., 1963) a railroad was held liable as an employer under the Jones Act to an employee who was injured while handling a barge brought to the railroad for unloading:

> "Plaintiff was employed as a bargeman at defendant's dock on the Ohio River at Conway, Pennsylvania. At this dock, coal is transferred from river barges to railroad cars. Lacking means of self-propulsion, the loaded barges arrive under tow at a mooring area. There the towing vessel releases its barges, and bargemen, employed by the railroad, take over the handling of the barges. The bargemen first moor them not far from the unloading point. Then, when the time arrives to unload a particular barge, cables, extending from the barge to the dock until it is in position under the unloading crane. After the unloading, the bargemen again use cables to maneuver the empty barge to a mooring place downstream and tie it to other moored barges. In these maneuvers, the bargemen ride the barges and secure or pay out cable as may be required. In addition to maneuvering and securing the barges, the bargemen also place lights on the vessels and pump

> water from them as necessary. In brief, all the handling and attending of barges, from the time a two boat releases its flotilla, through the unloading, until the time when the empty barges are towed away, is done by the bargemen. The bargemen also have duties ashore in connection with the movement of railroad cars to and from the place where the crane loads them with coal from barges." 317 F.2d at pp. 762-763.

Those facts are practically indistinguishable from the evidence developed on the issue here involved. See, also, *Cromwell v. Slaney,* 65 F.2d 940 (1st Cir., 1933) and *The Norland,* 101 F.2d 967 (9th Cir., 1939) involving the Jones Act. In both, the defendant was held liable as owner *pro hac vice* to seamen for injuries resulting from the unseaworthy condition of a vessel. In *Militano v. U.S.,* 156 F.2d 599 (2d Cir., 1946) a general agent of a vessel owned by the United States was found to have such control of the vessel as would subject it to liability under the Jones Act. A non-employee stevedore sued for shipboard injuries. The Court stated:

> "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work . . ." (156 F.2d at p. 602).

Thus it can be said that the decision here involved is consistent with the decisions of this Court and not in conflict with decisions of other courts of appeal in the same matter, and is in accord with related cases involving the maritime law generally.

III. There Is No Important Question of Federal Law.

The petitioner complains of the impact of the decision on the shipping industry generally and especially on the inland waterways. Any rule of law applicable to an industry has impact thereon and the impact on petitioner's local industry stems from the decision in *Reed v. Yaka,* supra, which was decided in 1963. The evidence will not warrant in every case the conclusion that those in petitioner's position are owners *pro hac vice.* That finding depends ultimately on the evidence in each case. Petitioner and those in the position of the petitioner have available to them the means for limiting the possibility of becoming liable to stevedores for unseaworthy conditions of the vessels given into their possession. They need not assume the status of owners *pro hac vice* by undertaking management and control of such vessels. Moreover, they will in most cases have available documents or other evidence showing the terms and conditions of their possession which may rule out a finding of ownership *pro hac vice.* But here, the petitioner assumed to act as owner and, so far as the evidence shows, did not in any way limit its right of possession and control.

IV. Petitioner Did Not Comply With Rule 21.

Only a single typewritten petition was filed within the ninety day period permitted by law for seeking a review. All other acts of the petitioner seeking to perfect the filing of the petition were accomplished after the jurisdictional deadline had expired. It is not disputed that this Court can relax its non-jurisdictional or procedural rules in the exercise of its discretion when the

ends of justice so require. It can be assumed that in a proper case and on the basis of a timely application showing reasonable grounds for granting additional time for compliance, the Court would grant such relief. However, the language of Rule 21 appears to be mandatory. Petitioner did not request any extension of time and has filed no reasons justifying its departure from the rule. Because petitioner delayed action until the very last day, respondent's counsel reluctantly is obliged to assert the procedural defect in the petition. If the petition is not properly filed, certiorari must be denied. It is suggested that no reason appears on the present record which would justify the Court in its discretion to waive the necessary, mandatory and well-known provisions of Rule 21.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EVANS, IVORY & EVANS
PAUL E. MOSES
Attorneys for Respondent

November 17, 1971.

APPENDIX

RULE 21. Review on certiorari -- how sought — parties

* * *

3. Counsel for the petitioner shall file with the clerk of this Court, with proof of service as provided by Rule 33, forty copies of a petition which shall comply in all respects with Rule 23 and shall enter his appearance and pay the docket fee. The case will then be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 33.

* * *

RULE 22. Review on certiorari — time for petitioning

* * *

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23(1), subparagraphs (b) and (f), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35 (2), and 50. Such applications are not favored.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Your petitioner, United States Steel Corporation, respectfully prays that the Court reconsider its Order denying its Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled cause, entered by this Court on January 10, 1972, and grant the Petition.

As grounds for this Petition, petitioner respectfully requests the Court's consideration of the following:

I. PETITIONER WAS NOT THE OWNER PRO HAC VICE OF THE BARGE INVOLVED.

The barge or barges upon which respondent was working at the time of his alleged accident were admittedly owned by third parties. Prior to respondent being employed on the barges in question, the barges had been towed to petitioner's landing. Although petitioner did have limited possession and control of these barges while they were tied at its landing for loading

purposes, yet it had no authority to repair or maintain them and had no towing facilities for moving the barges except that by means of pulleys, petitioner's employees could move the barges some 50 feet in its own dock so as to facilitate the loading of the same.

The evidence in this case discloses no agreement either written or oral between the owners of said barges and the petitioner herein with respect to chartering of the barges either as a bareboat or time charter, the custom being that once the barges were brought to petitioner's landing they would be loaded with pipe and, after loading had been completed, petitioner would notify either the owner or a barge line company to pick up the loaded barge and take it to its destination.

In the District Court's 20th Finding of Fact it was stated as follows:

> "20. The ownership of the barge vessel has not been firmly established, although it appears certain that it was not owned by defendant at the time of the accident. This fact is immaterial, in my considered judgment. It matters not whether the defendant was the owner, charterer, lessee or bailee of the barge vessel or whether the defendant had a right of possession on an hourly, daily, yearly or monthly basis. Since the barge vessel was in the sole and absolute control of the defendant, liability for the unseaworthy condition must exist against said defendant."

From the above finding of fact it can be seen that the District Court made no determination as to whether your petitioner was a bareboat charterer or time charterer of the barge involved, or in fact whether there was

any charter of the vessel. The court clearly stated that it was immaterial whether your petitioner was the owner, charterer, lessee or bailee of the barge; that since it was in sole and absolute control of the barge, it was liable for any unseaworthy condition thereon. Since the court has determined that your petitioner was not the owner of the barge at the time involved, in order to hold your petitioner liable it was incumbent upon the court to find as a fact that petitioner was the bareboat charterer and therefore its owner *pro hac vice*. No such finding was made by the court.

In Norris on *Maritime Personal Injuries,* Second Edition, Section 85 at page 212, the author gives the distinguishing features of the types of charter parties as follows:

> "*Demise or Bareboat Charter*. The vessel is chartered or 'leased' to another who takes possession, custody and control of the vessel. The master is hired and paid by the charterer and is the agent and representative of the charterer. The demise charterer becomes the employer of the master and the crew. As owner *pro hac vice* he is responsible for personal injuries caused by them under the doctrine of *respondeat superior*. The operating expenses of the vessel, such as wages, fuel, subsistance, wharfage charges, etc., are paid by the charterer. The owner surrenders entire control and possession of the vessel and subsequent control over its navigation to the bareboat charterer, who becomes the owner *pro hac vice*.
>
> "*Time Charter*. The vessel is chartered or 'leased' to the charterer for a fixed period of time.

Custody and control remains with the vessel owner. The vessel owner hires, pays and is the employer of the master and crew. The owner pays all of the operating expenses of the vessel and the time charterer merely has the use of the vessel in return for his payment of the charter hire.

"*Voyage Charter.* It is similar in all respects to the time charter, except that the ship is hired for a single voyage."

As stated above, in order to constitute a bareboat charter the owner must surrender entire control and possession of the vessel and subsequent control over its navigation to said bareboat charterer who then becomes the owner *pro hac vice.* Although your petitioner had in effect limited control of the barges in question while they were tied up at its landing and during the loading thereof, yet it did not have such possession and control as to constitute operational or navigational interest in the vessels.

In the case of *Guzman v. Pichirilo,* 369 U.S. 698, 8 L.Ed.2d 205 (1962), the court at pages 699-700 stated as follows:

"To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. *United States v. Shea,* 152 U.S. 178 (1894); *Leary v. United States,* 14 Wall. 607 (1872); *Reed v. United States,* 11 Wall. 591 (1871). See generally Gilmore & Black, The Law of Admiralty, 215-219; Robinson, Admiralty, 593-601; Scrutton, Charterparties (16th ed., McNair & Mocatta), 4-7. It is therefore tantamount to, though just short of, an

outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. . . ."

In the case of *James Miller v. Union Barge Line Corporation, et al.,* 299 F.Supp. 718 (W.D. Pa., 1969), the plaintiff, a longshoreman, was employed by the Port of Louisville, a stevedoring enterprise, and was injured aboard a barge belonging to Union Barge Line Corporation. The barge was in navigable waters at the time and the injury was caused by a defective hatch cover lock. Union Barge Line Corporation claimed that the barge in question was under bareboat charter to the co-defendant, Southern Transfer Company. Defendant Southern Transfer Company argued that the vessel was not in its possession or control at the time of the accident, that it was entirely in the possession and control of plaintiff's employer, Port of Louisville, which accepted delivery of the barge for unloading purposes before the accident. In discussing the question of a demise or bareboat charter, Judge Weber, at page 720, stated as follows:

"The demise or bare boat charter which relieves an owner of liability for seaworthiness must be a complete and exclusive relinquishment of possession, command and navigation. It is therefore tantamount to, though just short of, an outright transfer of ownership. Anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. The owner has the burden of showing such a charter. This burden is heavy for the courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed.2d 205 (1962).

"While the comparison between large ocean going vessels and unmanned and unpowered river barges is farfetched, nevertheless, we attempt to apply the same admiralty principles, and we cannot find that the delivery of a loaded barge to a stevedoring company for unloading amounts to the condition of being 'tantamount to, though just short of, an outright transfer of ownership' described in Guzman v. Pichirilo, supra, p. 700, 82 S.Ct. p. 1096."

In the case of *Bellomy v. Union Concrete Pipe Co.*, 297 F.Supp. 261 (S.D. W. Va. 1969); aff'd per curiam 420 F.2d 1382 (1970); cert. denied 400 U.S. 904 (1970), the plaintiff brought an action for damages for personal injuries under the Jones Act and the doctrine of unseaworthiness against his employer. Plaintiff was employed as a crane operator by Union Concrete Pipe Company, which crane was located upon a dock owned by the defendant on the bank of the Ohio River and was utilized for the purpose of unloading sand, gravel and other material from floating barges tied to the dock. As part of his duties, plaintiff was occasionally required to go aboard a barge for the purpose of moving it along the dock in connection with the unloading operations. While thus engaged upon a barge tied to the dock, he was injured. In his opinion granting defendant's motion to dismiss, the District Court at pages 265-266 stated as follows:

"The doctrine of unseaworthiness, whereby a duty is imposed upon the owner of a vessel to furnish a seaworthy ship, has no application to the facts of this case inasmuch as the defendant in this action is not the owner of the boat nor was the boat in its possession or under its control at the time plaintiff

was injured. Watson v. Gulf Stevedore Corporation, 374 F.2d 946 (5th Cir., 1967). This case is distinguishable from Reed v. The YAKA, supra, since in that case the plaintiff's employer, the defendant in the suit, was also the bareboat charterer, or owner *pro hac vice,* and as such was liable for unseaworthiness. . . ."

II. PETITIONER HAD NO OWNERSHIP OR OPERATIONAL INTEREST IN THE VESSELS INVOLVED.

Prior to *Reed v. Yaka,* 373 U.S. 410; 10 L.Ed.2d 448 (1963), the vessel owner alone owed to the longshoreman the nondelegable obligation to maintain a seaworthy vessel and as a result the longshoreman had the right to sue the vessel owner *in personam* or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp. v. Dugan & McNamara,* 364 U.S. 421, 424 5 L.Ed.2d 169 (1960). In *Reed v. Yaka, supra,* your Honorable Court for the first time held that a bareboat charterer was presumably liable for the unseaworthiness of the chartered vessel.

In reviewing the various decisions since *Reed v. Yaka* involving the right of a longshoreman to sue his employer for damages for unseaworthiness in cases where the employer is not the owner of the vessel, it has been generally held that the longshoreman can recover from the employer only where his employer is the bareboat charterer of the vessel involved, which includes having an operational or navigational interest in the vessel. In *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir., 1967); cert. denied 389 U.S. 927

(1967), the court held that an injured longshoreman who was doing work traditionally done by seamen can maintain an action for unseaworthiness, but such action must be against the vessel *in rem* or the owner of the vessel *in personam* and cannot go directly against a stevedore-employer having no ownership or operational interest in the vessel.

In the case of *Savard, et al. v. Marine Contracting, Inc. and Perini Corporation,* 296 F.Supp. 1171 (D. Conn., 1969), decedent, an employee of defendant Marine Contracting, Inc., was engaged in diving operations on the barge CHOCTAW for defendant Perini Corporation. The barge was anchored in the navigable waters in Narragansett Bay. During the course of a dive, decedent was killed. In discussing the various remedies of a longshoreman under the circumstances therein involved, Chief Judge Timbers, at pages 1174-1175, stated as follows:

> "The exclusivity provision of § 905 of the Longshoremen's Act does not bar actions by maritime workers against employers who are also shipowners. See Jackson v. Lykes Bros. S.S. Co., Inc., 386 U.S. 731 (1967), following Reed v. The Yaka, 373 U.S. 410 (1963). See also Scopaz v. S.S. Santa Luisa, 372 F.2d 403 (2 Cir.), cert. denied, 387 U.S. 922 (1967). However, *Jackson* did not nullify the effect of the exclusivity provision of § 905 when the defendant employer is not the owner or lacks other operational interest in the vessel involved in the litigation. See Watson v. Gulf Stevedore Corp., 374 F.2d 946 (5 Cir.), cert. denied, 389 U.S. 927 (1967). Although a maritime worker can sue a vessel owner in personam or the vessel in rem for injuries caused by the vessel's unseaworthiness, and such

owner can seek indemnification against the worker's employer for breach of its warranty of workmanlike service, the maritime worker cannot subrogate himself to the owner's rights in a direct action against the employer. Instead, he must pursue his remedy, as against his employer, solely under the Longshoremen's Act. *Watson,* supra."

In the case of *Rao v. Hillman Barge & Construction Company,* 326 F.Supp. 1091 (W.D. Pa., 1971), now on appeal to United States Court of Appeals for the Third Circuit, plaintiff was employed as a painter's helper in defendant's shipyard. A barge belonging to United States Steel Corporation was hauled out of the water for repairs. Plaintiff carried spray paint equipment aboard the beached barge and was injured in removing the cap from the pressurized spray paint tank. Although the employer paid compensation to the plaintiff under the provisions of the Longshoremen's and Harbor Workers' Compensation Act which he accepted, he nevertheless sought to recover damages under the Jones Act and for unseaworthiness of the vessel. The case was first submitted to a jury which made a finding that the plaintiff was not a seaman. The case then proceeded before the Court without a jury as to plaintiff's alleged remedy for unseaworthiness. In dismissing plaintiff's claim, the District Court, in its opinion at page 1093, stated as follows:

"Plaintiff also alleges error in the court's refusal to submit the question of unseaworthiness to the jury after the finding that he was not a seaman, arguing that in any event, whether a seaman, a longshoreman, or an industrial worker, under the State Workmen's Compensation Act, he is still en-

titled to the maritime remedy for injury due to unseaworthiness. We refused this because the only defendant here is his employer, and the defendant was not the owner or charterer of the vessel at the time of the injury. The longshoreman's remedy for unseaworthiness is limited to an action *in rem* against the vessel, or against its owner or charterer. Jackson v. Lykes Bros., S.S. Co. 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1966); Reed v. The Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963); Thomas v. Peterson Marine Service, Inc., 411 F.2d 592 (5th Cir., 1969)."

Although the various decisions on the question herein involved have stated that the longshoreman cannot recover for unseaworthiness against his stevedore-employer having no ownership or operational or navigational interest in the vessel, we find no opinion in which the court attempts to define "operational" or "navigational" interest in the vessel. The factor of control is very important in distinguishing the demise charter from the time and voyage charters. If the vessel owner retains the possession, command and navigation of the ship, merely carrying the charterer's goods, then, irrespective of how the charter party may be labeled, it is either a time or voyage charter and not a bareboat charter. As has frequently been stated, "to create a demise the owner of the vessel must completely and exclusively reliquish possession, command and navigation thereof to the demisee. It is therefore tantamount to, though just short of, an outright transfer of ownership."

The evidence in this case clearly shows that while petitioner had limited control and possession of the

barge while it was tied up in its landing, yet it did not have such complete possession and control and operational and navigational interest therein so as to constitute it the owner *pro hac vice*.

CONCLUSION

For these reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, the undersigned counsel for petitioner herein, do hereby certify that the within Petition for Rehearing of Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay, and we do further certify that the within Petition is restricted to substantial grounds, particularly citations not previously presented to this Court.

GILBERT J. HELWIG

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